COALITION FOR A
DEMOCRATIC WORKPLACE

The Secret Ballot Protection Act
Reduce Coercion in Union Organizing; Protect Employee Privacy

Employees should have the right to voluntarily choose—or not choose—union representation. This decision should be without intimidation or coercion by union organizers or employers. T he most widely accepted method to insure a fair outcome is for employees to vote by secret ballot. However, labor unions have increasingly sought to organize through a "card check" process which is characterized by union organizers using strong-arm tactics. In the last Congress, labor unions attempted to permanently deprive employees of a secret ballot through the deceptively-named "Employee Free Choice Act" ("EFCA"). To protect against ongoing and future attempts to rob employees of their ability to vote in private, Rep. Phil Roe (R-TN) and Sen. Jim DeMint (R-SC) recently introduced the Secret Ballot Protection Act (H.R. 972, S. 217) ("SBPA"). The SBPA will guarantee that employees can cast a vote in private regarding the critical decision of whether to choose or not choose union representation.

I. Why is Secret Ballot Voting in Union Elections Important?

The annals of NLRB case law are packed full of examples where the use of card check has been challenged because of coercion, misrepresentation, forgery, fraud, peer pressure, and promised benefits.[1] In testimony before the House Subcommittee on Workforce Protections, an employee described the various misrepresentations and coercive tactics used by union organizers utilizing card check. The tactics included threats of termination, deportation, and loss of 401(k) and health benefits for not signing a card; and promises of green cards, termination of supervisors, and free turkeys for employees who did sign cards.[2] It is no wonder then that federal courts have questioned the reliability of card check procedures. For example, in one case the Fourth Circuit observed that, "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands."[3]

II. Wasn't the Employee Free Choice Act Defeated?

Although EFCA has not been introduced in this Congress, employee privacy and freedom still face serious threat. Consider the following examples:

1. Unions Increasingly Evade Elections In Favor Of Card Check. For instance, in a 2006 article in the *Wall Street Journal*, Stewart Acuff, national organizing director for the AFL-CIO, was quoted as saying, "Most of the unions that have large-scale organizing capacity are moving as much as they can away from the NLRB [secret ballot] organizing process."

2. NLRB Poised to Eliminate Right to Seek Election. While the NLRB has long provided for secret ballot elections to determine union recognition, the law currently permits unions to evade this requirement by using card check if the employer also agrees. In 2007, the Board strengthened employee rights by holding that even if an employer and union sought to evade a secret ballot

[1] *See July 23, 2002, Testimony of Daniel V. Yager before the House Subcommittee on Workforce Protections* (listing over 100 cases involving challenges to card check elections), available at http://www.gpo.gov/fdsys/pkg/CHRG-107hhrg82142/pdf/CHRG-107hhrg82142.pdf.
[2] *See July 23, 2002, Testimony of Bruce G. Esgar before the House Subcommittee on Workforce Protections,* available at http://www.gpo.gov/fdsys/pkg/CHRG-107hhrg82142/pdf/CHRG-107hhrg82142.pdf.
[3] *NLRB v. S.S. Logan Packing Co*., 386 F.2d 562, 565 (1967).

election, employees could still demand an election if they filed a petition with the Board within 45 days[4]. The current Board is now seriously considering reversing this decision, which will mean that if an employer agrees to recognize a union based on card check, employees will have no way to demand an election.[5]

3. Further Board Actions Likely To Invite Greater Union Coercion. Cases currently pending before the Board could: (1) ease union organizers' access to an employer's private property, (2) mandate remote, electronic elections that could increase pressure to vote in the presence of union organizers, and (3) allow union "salts" to infiltrate the workplace for the purpose of organizing other employees, and (4) greatly increase the ability of unions to gerrymander bargaining units to establish a beachhead where a true majority of employees would not support unionization. All of these cases not only have the potential to make it significantly easier for unions to organize, but seriously threaten employee privacy and true employee free choice.

III. The NLRB, the Supreme Court, Rep. George Miller, and the AFL-CIO All Have Supported Secret Ballot Elections When Convenient

In a brief to the Ninth Circuit Court of Appeals, the NLRB once stated: "Congress and the Supreme Court regard a secret ballot election conducted under the Board's auspices as the preferred method for resolving representational disputes in the manner that best ensures employee free and informed choice."[6] Similarly, a letter sent by Rep. George Miller and 15 other members of Congress to Mexican government officials said, "We understand that the secret ballot is allowed for, but not required, by Mexican labor law. However, we feel that the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose."[7] Even the AFL-CIO has expressed support for secret ballot elections, arguing that in *decertification* petitions secret ballot elections "provide the surest means of avoiding decisions which are the results of group pressures and not individual decisions."[8]

IV. What Does the Secret Ballot Protection Act Do?

The SBPA would amend the National Labor Relations Act to require that union recognition be based only a secret ballot election, conducted by the NLRB. The bill does this by making it an unfair labor practice for an employer to recognize or collectively bargain with a union unless it was selected by a majority of employees in a secret ballot election conducted by the NLRB. Similarly, the bill makes it an unfair labor practice for a union to try to secure recognition without using a secret ballot election. The bill's requirements are not retroactive and do not apply to collective bargaining relationships in effect prior to enactment.

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[4] *Dana Corp*., 351 NLRB 434 (2007).
[5] *Lamons Gasket*, 355 NLRB No, 157 (Aug. 27, 2010).
[6] Brief for the NLRB as Amicus Curiae in the *Chamber of Commerce of the United States v. Bill Lockyer* at 5 (citing *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 307 (1974); *NLRB v. Gissel Packing Co*., 395 U.S. 575, 596 (1969)).
[7] August 29, 2001, letter to Junta Local de Conciliacion y Arbitraje del Estado de Puebla.
[8] Joint Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America, the United Food and Commercial Workers, and the AFL-CIO in *Chelsea Industries and Levitz Furniture Co. of the Pacific, Inc.,* Nos. 7-CA-36846, 7-CA-37016 and 20-CA-26596 (NLRB).